

EX PARTE JONES

IN THE COURT OF CRIMINAL APPEALS

MOTION TO STRIKE THE BRIEF OF THE OFFICE OF THE ATTORNEY GENERAL

Mr. Jones moves to strike the brief of the Office of the Attorney General,

FILED
 COURT OF CRIMINAL APPEALS
 4/2/2019
 DEANA WILLIAMSON, CLERK

and would show:

The Office of the Attorney General filed a brief as a purported *amicus curiae* “in support of the State.” The Office of the Attorney General’s sole client is the the State of Texas,¹ which is a party to the case, so the Office of the Attorney General is not an *amicus curiae*.

The Office of the Attorney General has no independent authority to represent the State in this Court.

SEPARATION OF POWERS FORBIDS THE OFFICE OF THE ATTORNEY GENERAL’S INTERVENTION.

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.²

“The Separation of Powers Clause is violated...when one branch of government assumes power more properly attached to another

¹ Tex. Const. art. 4, § 22.

² Tex. Const. Art. 2, Sec. 1.

branch....”³ The separation of governmental powers is neither a triviality nor a technicality. It is “essential to the preservation of the rights and liberties of the people, and should be thoughtfully and faithfully observed by all clothed with the powers of government....”⁴

The State Prosecuting Attorney is a part of the judicial branch of Texas government,⁵ as is the Smith County District Attorney.⁶ The Attorney General is a part of the executive branch of Texas government.⁷

The Legislature created the Office of the State Prosecuting Attorney to represent the State before this Court.⁸ It never gave the Attorney General authority to join sua sponte in proceedings before this Court.⁹ If the legislature had done so, that authorization would

³ *In re D.W.*, 249 S.W.3d 625, 635 (Tex. App.—Fort Worth 2008), review denied, 260 S.W.3d 462 (Tex. 2008).

⁴ *Langever v. Miller*, 76 S.W.2d 1025, 1035 (Tex. 1934).

⁵ See Tex. Govt. Code §42.001(a).

⁶ See Tex. Const. art. 5, §21.

⁷ See Tex. Const. art. 4, §22.

⁸ Tex. Govt. Code §42.001 et seq.

⁹ See *id.*

have violated the Separation of Powers Clause of the Texas Constitution. It is “an established and fundamental principle of constitutional law that the executive cannot exercise either judicial or legislative authority.”¹⁰

The Smith County District Attorney could have, at any point, asked the Office of the Attorney General for help.¹¹ But he did not. Or if he did, the Office of the Attorney General declined.

THE ATTORNEY GENERAL’S CONSTITUTIONAL POWERS

Absent some statutory requirement that he intervene (which does not exist, and which would violate separation of powers if it did), filing a brief in a criminal appeal such as this one is outside the Attorney General’s constitutional powers:

The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause

¹⁰ *Langever v. Miller*, 76 S.W.2d 1025, 1035 (Tex. 1934).

¹¹ See Tex. Govt. Code § 402.028.

exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.¹²

The duties of the Attorney General “required by law,” listed in Subchapter B of Chapter 402 of the Texas Government Code, include representation of the State “before the supreme court and courts of appeals,”¹³ but do not include appearances before this Court.¹⁴

The Attorney General could certainly have provided the Smith County District Attorney, had he needed or requested the assistance at any time, with assistance “including participation by an assistant attorney general as an assistant prosecutor when so appointed by the district attorney,”¹⁵ but he may not intervene on his own.

An assistant attorney general could have appeared on this case, briefed this case, and argued this case, but she could have done so only under the Smith County District Attorney’s appointment, as an assistant Smith County district attorney. This is consonant with

¹² Tex. Const. art. 4, § 22.

¹³ Tex. Govt. Code § 402.021.

¹⁴ See Tex. Govt. Code §§ 402.021 *et seq.*

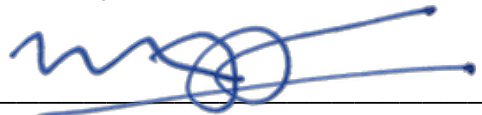
¹⁵ Tex. Govt. Code § 402.028.

separation-of-powers principles—one branch may assist another at the other’s request, even if it could not assume powers of that branch *sua sponte*.

While Article V, section 32 of the Texas Constitution permits the Legislature to require notice to the Attorney General of constitutional challenges. It does not give the Office of the Attorney General authority, either statutory or constitutional, to file a brief or otherwise intervene.

Because the Attorney General represents a party to this case, but has neither constitutional nor statutory authority to intervene, he has no standing. This Court should strike its brief.

Thank you,



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